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HAROLD B. WILLEY, C

In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 559

ROGERS RIDGEWAY,
Petitioner,

vs.

GEORGIA RIDGEWAY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

ALEXANDER H. MARTIN,
Prospect E. 4th Bldg.,
Cleveland, Ohio,
Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. .....

ROGERS RIDGEWAY,
Petitioner,

vs.

GEORGIA RIDGEWAY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

Petitioner prays that a Writ of Certiorari issue to review the judgment and order of the Supreme Court of Ohio (made final on October 13, 1954, by its order overruling his motion to vacate same), dismissing his appeal as of right from a judgment of the Court of Appeals of the Eighth Judicial District of Ohio, affirming the general judgment and decree for divorce, and granting alimony and attorney fees, entered against Petitioner, as defendant, on February 2, 1954, by the Common Pleas Court of the County of Cuyahoga, State of Ohio, and, at the same time, overruling Petitioner's duly filed motion to certify the record of said judgment of affirmance of said Court of Appeals, to said Supreme Court of Ohio, for review.

I.

OPINIONS BELOW.

a. Under the operation of Sec. 2315.22 O. R. C., and his timely request for special findings, thereunder, a judgment and decree, void for irregularity, was entered on January 4, 1954, in Divorce Journal 332, p. 9 of the Common Pleas Court of Cuyahoga County, Ohio. Same destroyed, if valid, Petitioner-Defendant's marital relation, and awarded a sequestration of his real property and excessive alimony and attorney's fees to the attorneys of Respondent,—against him. Same is unreported. (See Transcript and Appendix.)

b. On February 2, 1954, a general judgment and decree against Petitioner-Defendant was entered in Divorce Journal 332, p. 359 of said Common Pleas Court, which under the mandatory operation of Sec. 2315.22 O. R. C. his said timely request thereunder, and the record above referred to, was irregular and void,—as in excess of the jurisdiction of the Court, in the premises. Same is unreported. (See Transcript.)

c. On April 7, 1954, two unreported, inconsistent Opinions of the Court of Appeals of the Eighth Judicial District of Ohio, affirmed said irregular, void decrees of said Cuyahoga Common Pleas Court, referred to in paragraphs a and b hereof,—*supra*. (See Copies in Appendix.)

d. On June 30, 1954, the Supreme Court of Ohio, in effect affirmed, said Court of Appeals' said void judgment of affirmance, Div. II a, *infra*, and *Matthews v. Huwe*, 269 U. S. 262.

II.

JURISDICTION.

a. On June 30, 1954, the judgment of the Ohio Supreme Court was entered, dismissing Petitioner's appeal as of right from said judgment of affirmance of said Court of Appeals, and overruling his duly filed motion to certify the record of said affirmance, to said Supreme Court, for review. (Copy in Appendix.)

b. On October 13, 1954, judgment of the Ohio Supreme Court overruling Petitioner's duly filed motion to vacate said above referred to order and judgment dismissing his said appeal as of right, and overruling his duly filed motion to certify the record of said Court of Appeals therein, to said Supreme Court for review, was made and entered. (Copy in Appendix.)

c. Jurisdiction herein is invoked under 28 U. S. C., Sec. 1257 (3) and the authorities and practice thereunder. The judgment and decree complained of is based on a Federally offensive construction of Sec. 3105.01 R. C. which renders same, on the face of the record, repugnant to Art. XIV, Sec. 1, of the Federal Constitution, and Art. IV, Sec. 2, Constitution of Ohio.

1. In denying Petitioner procedural due process of law in said trial, decree and judgment and the seizure and sequestration of his property, thereunder.
2. In denying Petitioner equal protection of the law.
3. In entering said decree against Petitioner, destroying his marital status and sequestering his property while denying him the written statutory notice by a copy of the petition stating the nature and cause of the marital offenses complained of, and in not according him opportunity to defend, against same.

4. In affirming by said judgment, the judgment and decree of the trial court,—rendered invalid by paragraph 3, *supra,* and as in excess of any jurisdiction conferred upon that court, and permitted by the limitations of the statutes under which the court was operating,—thereby rendering said *affirmance void,* also.

The federal question which was timely raised on January 5, 1954, by Petitioner's motion for a new trial and objections to the current findings of fact and conclusions of law, by Merrick, J., filed therein on January 4, 1954, Divorce Journal 332, p. 9, but arbitrarily ignored and not passed upon, thereby ousting the court of jurisdiction to validly proceed further in the case because of said procedural irregularity, *Windsor v. McVeigh,* 93 U. S. 274.

III.

QUESTIONS PRESENTED.

We present,—

(1) With the factually defective petition shown in Division V, *infra,* hereof, as a basis,—may the mandatory procedural statute, Sec. 2315.22 R. C., be ignored by the Ohio trial court in entering a decree for divorce, as a general decree, instead of the special findings of fact and conclusions of law, as requested and required, without avoiding its decree?

Bittman v. Bittman, 129 O. S. 123.

(2) Does the destruction of his marital rights and seizure of defendant's property in order to pay alimony and attorneys fees, awarded under the void decree and circumstances mentioned in No. 1, *supra,* offend against Sec. 1, Art. XIV, of Amendments to the Federal Constitution, and Article IV, Sec. 2, Constitution of Ohio?

(3) Does the decree mentioned in Div. V, hereof, *infra*, and Paragraphs 1 and 2, *supra*, hereof, jurisdictionally exceed the statutory limitations upon the method of operation of the Ohio divorce court, and render said judgment and decree so entered, void for irregularity as offending against the constitutional provisions of due process of law and the equal protection of the law, *supra*, and to have justice administered by due course of law, without denial or delay, Art. I, Sec. 16, State Constitution?

(4) Does not the public interest, in view of the crime menace adverted to in Paragraph 4, Div. VI, *infra*, hereof, require this divorce action to be considered as an attack upon the public's marital contract, and upon the public's home citadel of law and order, resting and based thereon, with a compelling duty and obligation resting on the public's court to prevent, by law, said home's possible extinction, as the public's affirmative contribution, in said crisis, toward preventing,—should the home fall, the resultant delinquency of parenthood and children flowing from another "broken home,"—as a better challenge to crime, than are criminal courts, penitentiaries and reformatories, demanding a careful investigation and prompt trial and decision of every issue of law and fact properly involved in the Case, according to law?

Insurance Co. v. Meyers, 59 O. S. 332.

(5) May the court approve, condone, or seem to condone by omitting to condemn same, and by failing to avoid, as "poisonous in its consequences," the financial profit and advantage accruing to Respondent as a direct result of the unsavory conduct adverted to in Paragraph 5, Div. VI, hereof?

Barrington v. Alexander, 6 O. S. 189;
Caldwell v. Caldwell, 45 O. S. 512.

IV.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitutional provisions involved are,

Art. XIV, Sec. 1, U. S. Constitution,
Art. I, Sec. 16, Constitution of Ohio (*infra*, p. 9),
Art. IV, Sec. 2, Constitution of Ohio (*infra*, p. 7),
Sec. 2309.34—Oh. R. C. (*infra*, p. 24),
Sec. 2309.04—Oh. R. C. (*infra*, p. 24),
Sec. 2311.01—Oh. R. C. (*infra*, p. 24),
Sec. 2311.02—Oh. R. C. (*infra*, p. 25),
Sec. 2311.03—Oh. R. C. (*infra*, p. 25),
Sec. 2315.22—Oh. R. C. (*infra*, p. 25),
Sec. 3105.01—Oh. R. C. (*infra*, p. 25).

V.

STATEMENT.

A petition was filed for Plaintiff-Respondent by Attorneys Fernberg and Fernberg, who were then attorneys for Petitioner, as a defendant in pending litigation in said court (Paragraph 5, Div. VI, hereof) also.

Said petition of said Respondent alleged only that,—

> "Defendant in violation of his marital obligations toward this plaintiff has been guilty of extreme cruelty and gross neglect of duty,"

as the sole ground for divorce, and failed, utterly, to allege any traversable facts charging against him any of the *Ohio statutory grounds for divorce.* Petitioner was required to defend, although the summons and copy of the petition, as the required statutory notice, thus vitiated by the said factual defects, *accorded him no actual, valid notice of any pending, valid proceedings for divorce and alimony, but emphasized the inescapable invalidity of said ostensible proceedings,* by stating a purpose to prove two statutory

grounds for divorce at the impending trial, but without alleging same.

On February 2, 1954, however, ignoring Petitioner's duly interposed request for special findings, under the mandatory, procedural Ohio Statute, Sec. 2315.22 R. C., the Court irregularly entered a *general judgment and decree* for divorce, and irregularly awarded attorney fees in the sum of upwards of a thousand dollars, and awarded to Respondent, the plaintiff therein, valuable real estate holdings of the defendant, as alimony, all as incident to said alleged divorce decree, all in excess of the jurisdiction of said Court, as limited by the applicable statutes, and the practice thereunder,—rendering said decree *void and confiscatory*, as offending against Petitioner's constitutional rights to due process of law and the equal protection of the law, under Art. XIV, Sec. 1, Federal Constitution, and Art. I, Sec. 16, Constitution of Ohio, and other Constitutional limitations both State and Federal. Reference is made to Div. II hereof, and Art. IV, Sec. 2, Constitution of Ohio, conferring upon our Supreme Court of Ohio—

> "Appellate jurisdiction in all cases involving questions arising under the Constitution of the United States or of this State."

Nevertheless—

The said Court of Appeals of the Eighth Judicial District of Ohio affirmed said void judgment of said Common Pleas Court and said Supreme Court of Ohio by its order and judgment dismissing Petitioner's appeal as of right, and denying his motion to certify, in effect, confirmed same.

> "The affirmance of a void judgment on review, leaves it still invalid and void."
>
> *Freeman on Judgments*, 322, 344 (5th Ed.)

VI.

REASONS FOR GRANTING THE WRIT.

As reasons for the allowance of the Writ in this case, Petitioner says, that,—

(1) The ruling, decision, order and judgment of the Supreme Court of Ohio, here complained of, dismissed Petitioner's appeal as of right, on the alleged ground that "No debatable Constitutional question was involved." Thus entertaining, and entering upon the consideration of the case on the merits of Petitioner's appeal as of right, involving the application of the Fourteenth Amendment to the Federal Constitution, and *deciding the same*, adversely to the Petitioner, *without according him*, and *while denying him*, the right to be heard, *with open mind*, on the merits of said Appeal, on said Constitutional question, said Court in effect affirmed the judgment here complained of. *Tumey v. Ohio*, 273 U. S. 510-515; *Matthews v. Huwe*, 269 U. S. 262.

The face of the record, however, showed a failure to allege any traversable fact, as a statutory ground for divorce, but only conclusions of law (in the Petition) and no notice of same before trial, and actually stated the plaintiff's purpose to withhold said notice of said facts, before the impending trial. The record shows the actual withholding of same before said trial, and further the failure of the trial court, representing the State, to require said defective pleading to be amended under the appropriate statute, and to require the regular trial procedure of the code in said divorce case, in its necessary attack upon the State's marital contract and a state established and protected home.

(2) Said order complained of, dismissing Petitioner's motion to certify said record of said judgment of affirm-

ance of said Court of Appeals to said Supreme Court of Ohio, for review, as not presenting a case of public or great general interest, denies an applicable controlling proposition of law and fact to the contrary, of which the Court must be held to have judicial knowledge, because so well known to the public, and so universally complained of by the public (paragraph 4 hereof, *infra*), thus offending against Petitioner's right to appeal to said Court for a hearing, and his right to have such hearing accorded him, and against his right to have and require said court to administer justice promptly to him, in the premises, accruing under Art. I, Sec. 16, of the Ohio Constitution, to the effect that,

> "All courts shall be open, and *every person*, for an injury done him in his land, goods, person, or reputation, *shall have remedy by due course of law* and *shall have justice administered without denial or delay.*"
>
> "The right to appeal from a subsisting judgment is as valuable and ought to be as sacred as the right to bring the original action, or defend against it."
>
> *Bode v. Welch*, 29 O. S. 19, 21;
> *Insurance Co. v. Meyers*, 59 O. S. 332;
> *Laferty v. Shinn*, 38 O. S. 49;
> *O'Donnell v. Downing*, 43 O. S. 62.

(3) Thereby the State of Ohio withdrew the *aegis* of the State Constitution from him and left him defenseless against the lawless confiscation of his property and his civil rights, except for the defensive effect, and the protective operation in his favor, as a citizen of the United States, of Section 1, Art. XIV, of the Federal Constitution, which protection he now invokes.

(4) This case, however, being for divorce, for the dissolution of the marital contract, is by law in Ohio, made of

the greatest public and general interest, within the purview of the Constitution—Art. IV, Sec. 6—and the Trial Court, because thereof, is required to represent the State, the "third party" in every such case, lest the interest of organized society be neglected or unlawfully imperiled.

So, when the appropriate committee of the American Bar Association reports in 1928 that major crimes such as burglary and larceny have increased 1200% in that decade, and when Hoover and his F. B. I. currently report for our guidance, that a major crime was committed in America every 13.8 seconds during the first six months of 1954, and that in every four minutes of every day during that period, murder, man-slaughter, rape or assault to kill was committed, and that between January 1st and June 30th, 1954, an estimated 1,136,140 major crimes were committed, and that this is 8½% more than we suffered in the same period of 1953, and moreover, that this disgraceful trend, unabated, would create a record for all time, *we must insist that this forlorn condition of affairs, thus officially recognized, publicly proclaimed and universally known, compels our Courts to judicially know that this case, for divorce, involving the State of Ohio as a third party, for additional security reasons, to protect our American Home from extinction, must now be held to be an attack upon the greatest bulwark and protection against crime known to us, and consequently, under existing menacing conditions, is, in very truth, one of public and great general interest.*

(5) In Cause No. 630408 Cuyahoga Common Pleas Court, entitled "Malone v. Ridgeway," Attorneys Fernberg and Fernberg, i.e., Louis Fernberg and Louis P. Fernberg, Jr., are counsel for the defendant, this Petitioner.

They were his attorneys in that case, and in other important matters in the courts during the entire period of eleven months of Respondent's marriage to Petitioner-defendant. *As such they became and are confidants of many important facts, matters and information gained by, and freely imparted to them, as his attorneys, beyond the possibility of recall.*

This, the Respondent-plaintiff well knew, when she sought out and hired his said attorneys to be her attorneys in this case, in order to achieve an unfair and unconscionable advantage over Petitioner, and to unduly embarass him in his proper defense against this unwarranted divorce action. Their knowledge became her knowledge by their acceptance of employment as her attorneys in this case.

Notwithstanding the apparent and inescapable "hazard of abuse"—as is the Ohio phrase, *Barrington v. Alexander*, 6 O. S. 189—of said confidential relation of attorney and client, involved in said conduct, his said attorneys accepted said Respondent's said employment, became her attorneys against him, and as such, procured said judgment against him, which they are now, actively, as such attorneys, attempting to enforce. **Said judgment and decree is thereby avoided. Respondent may not in good conscience retain any financial advantage or profit accruing to her because thereof.**

Reasonable and proper deference to that sound public policy necessarily pervading the action and operation of all courts at all times, in such situations—wherever Law is known and respected, manifestly requires that no precedent be now established in this Court which would approve, or seem to condone the universally condemned, poisonous double dealing here shown.

CONCLUSION.

For the above and foregoing reasons this Petition for a Writ of Certiorari should be granted.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari issue out of this Honorable Court, duly authenticated, to the said Supreme Court of Ohio for the review and reversal of its said complained of judgment and order in Cause No. 34033 on the Docket of said Court, entitled, "Georgia Ridgeway, Plaintiff-Appellee v. Rogers Ridgeway, Defendant-Appellant," and for all orders, judgments and decrees necessary and proper in the premises, thereunto.

ALEXANDER H. MARTIN,
Counsel for Petitioner.

APPENDIX.

No. 23,123.

IN THE COURT OF APPEALS OF OHIO
CUYAHOGA COUNTY, EIGHTH DISTRICT.

GEORGIA RIDGEWAY,
Plaintiff-Appellee,

v.

ROGERS RIDGEWAY,
Defendant-Appellant.

OPINION.

(April 7, 1954.)

SKEEL, *J.*:

This appeal comes to this court on questions of law. The action is one in divorce. The trial court entered a decree of divorce for plaintiff and filed findings of fact and conclusions of law upon request of the defendant timely made. The plaintiff filed her petition for divorce in which the only allegations of fact as grounds for divorce were:

> "Defendant, in violation of his marital obligations toward the plaintiff, has been guilty of gross neglect of duty and extreme cruelty:—testimony of which will be produced at the trial * * *."

The defendant filed an answer denying the allegations of plaintiff's petition, and filed a cross-petition setting forth alleged grounds for divorce in his favor against the plaintiff. The plaintiff did not file a reply to defendant's answer, or an answer to defendant's cross-petition. The

case went to trial on the pleadings, without motion or objection, and at the conclusion of the trial the court found facts sufficient to justify a decree for divorce for the plaintiff, and against the defendant on his cross-petition, and found such findings of fact as supporting the following conclusions of law:

> "The defendant is guilty of gross neglect of duty and plaintiff is granted divorce and is awarded the Clearview Road property, the automobile now in her possession and $1000.00 by way of attorney fees."

The findings of fact and conclusions of law were filed with the papers in the case and journalized on January 4, 1954. A motion for new trial was filed January 5, 1954. The court did not pass on the motion for new trial, but signed and filed for journalization a decree granting plaintiff a divorce on February 2, 1954. Thereafter a second motion for new trial was filed on February 4, and overruled February 10, 1954.

The defendant's notice of appeal was filed January 25, 1954, on questions of law, it being recited in the notice that the appeal is "from said judgment, findings and conclusions of law and orders, awards, judgment and decree, and further to the failure to promptly grant his motion for a new trial herein."

The errors assigned are as follows:

1. Dismissal of defendant's cross-petition when the allegations thereof stood on the record conclusively admitted to be true, because no denial thereof was made by the plaintiff.

2. Failure and refusal to grant the prayer of defendant, requesting the dismissal of the amended petition, the defendant having fully answered, pleading new matter, and no reply having been filed, putting allegations thereof in issue.

3. Granting divorce and other relief incident thereto, to the plaintiff when a divorce and general relief should have been granted to the defendant on the admitted charges of gross neglect of duty and extreme cruelty in his cross-petition.

4. The special findings transcend the issues made by the pleadings and are foreign to and irrelevant to the issues presented on the pleadings.

5. Facts found, do not sustain the conclusions of law.

6. Error in not promptly granting defendant's motion for a new trial, filed January 5, 1954.

7. The entry of a general judgment and decree under date of February 2, 1954, when the court was mandatorily required to return special findings in the case.

8. The facts found, and the conclusions of law have no competent evidence in the record to sustain the same, because of the factual insufficiency of said amended petition.

9. The overruling of defendant-appellant's motion for a new trial.

10. Other errors, defects and irregularities too numerous to here detail, the indulgence and perpetration of which ousted the court of jurisdiction and rendered its decree of divorce and alimony void.

It is clear from the record that the court did not intend that its conclusions of fact and law should constitute the decree for divorce. The journalizing of such findings on January 4, 1954, did not constitute the judgment of the court. For that reason there was no judgment which could be the basis for the filing of a motion for new trial. The defendant's attempt to file such a motion on January 5, 1954, was of no legal effect.

Section 2321.19 R. C. provides in part:

> "The application for a new trial must be made within ten days after the journal entry of a final order, judgment or decree has been approved by the court in writing, and filed with the clerk of the court for journalization * * *."

Even if we were to consider the filing and journalizing of the finding of fact and conclusions of law as a judgment and defendant's motion for new trial as properly filed, it is his contention that as yet such motion has not been ruled on by the court and the contention is supported by the record. If this be true, then the notice of appeal was prematurely filed because Sec. 2305.07 R. C. effective October 27, 1953, in part provides that when a motion for a new trial is filed, the time for perfecting an appeal shall not begin to run, *and no appeal shall be taken* until the entry of the order on such motion is made of record. So that on the record, as contended for by defendant, this court is without jurisdiction at this time to entertain this appeal. *Schenley v. Kauth,* 160 O. S. 109.

The journal entry signed by the court, and filed for journalization on February 2, 1954, constituted the judgment of the court in this case as shown by the transcript. Neither a motion for new trial nor a notice of appeal has been filed, challenging the judgment of that date. The notice of appeal in this proceeding was filed January 25, 1954, seven days before the judgment was entered. For that reason this appeal must be dismissed as prematurely brought.

First, it is claimed that no answer having been filed to defendant's cross-petition, constitutes an omission of the allegations of fact contained therein, and if such facts be admitted, the plaintiff is not entitled to a divorce as a matter of law. There is no such thing as judgment by de-

fault in a divorce action. The failure to controvert or put in issue the allegations of a petition or cross-petition by answer or reply, in no sense constitutes an admission of the truth of the allegations of such pleadings.

The statute (Sec. 3105.11 R. C.) on the right of a plaintiff to a divorce on the allegations of a petition not put in issue by answer provides:

> "A judgment for divorce or for alimony shall not be granted upon the testimony or admissions of a party unsupported by other evidence. No admission shall be received which the court of common pleas has reason to believe was obtained by fraud, connivance, coercion, or other improper means. The parties, notwithstanding their marital relation, shall be competent to testify in actions and proceedings under Section 3105.01 to 3105.21 inclusive, of the Revised Code, to the same extent that any other witness might."

This section has application to the allegations of a cross-petition. A divorce action is one provided for by statute and is based on an appeal to the sound discretion of the trial (common pleas) court for the determination of facts in support of one or more of the grounds for divorce as provided by statute, which, if established by sufficient evidence, authorizes the judge to enter a decree accordingly, and technical rules of pleading, or the failure to plead by answer or reply, cannot be considered as admissions or take the place of required proof in such an action. It should also be noted that no objection was made to proceeding on the pleadings as they were when the case was called for trial.

It is next claimed that the petition which charges gross neglect of duty and extreme cruelty without allegations of fact which, if established, would constitute proof of such charges, does not state a cause of action. This

contention is not supported by the cases. While a petition so drawn is subject to a motion to make definite and certain, it is not subject to demurrer. *Kelly v. Kelly,* 74 O. App. 225.

An examination of the bill of exceptions shows that the court's conclusions of fact are well supported by credible evidence.

The claim that the court committed reversible error in failing to rule on defendant's motion for new trial, is not well taken because the motion was filed before judgment and was therefore not one which the court need consider.

If we were to find, therefore, that the appeal was properly before us we would be required to overrule the claimed errors and sustain the trial judge.

The record clearly shows that this appeal was prematurely brought and the same is therefore dismissed. Exceptions noted. Order see journal.

HURD, P.J., KOVACHY, J., concur.

OPINION.

(April 7, 1954.)

SKEEL, J.:

This appeal comes to this court on questions of law. The action is one in divorce. The trial court entered a decree of divorce for plaintiff and filed findings of fact and conclusions of law upon request of the defendant timely made. The plaintiff filed her petition for divorce in which the only allegations of fact as grounds for divorce were:

> "Defendant, in violation of his marital obligations toward the plaintiff, has been guilty of gross neglect

of duty and extreme cruelty:—testimony of which will be produced at the trial, * * *."

The defendant filed an answer denying the allegations of plaintiff's petition, and filed a cross-petition setting forth alleged grounds for divorce in his favor against the plaintiff. The plaintiff did not file a reply to defendant's answer, or an answer to defendant's cross-petition. The case went to trial on the pleadings, without motion or objection, and at the conclusion of the trial the court found facts sufficient to justify a decree for divorce for the plaintiff, and against the defendant on his cross-petition, and found such findings of fact as supporting the following conclusions of law:

"The defendant is guilty of gross neglect of duty and plaintiff is granted divorce and is awarded the Clearview Road property, the automobile now in her possession, and $1000.00 by way of attorney fees."

The findings of fact and conclusions of law were filed with the papers in the case and journalized on January 4, 1954. A motion for new trial was filed January 5, 1954. The Court did not pass on this motion for new trial, but signed and filed for journalization a decree granting plaintiff a divorce on February 2, 1954. Thereafter a second motion for new trial was filed on February 4, and overruled February 10, 1954.

The defendant's first notice of appeal was filed January 25, 1954, on questions of law and a second notice of appeal was filed on February 23, 1954.

The errors assigned are as follows:

"1. Dismissal of defendant's cross-petition when the allegations thereof stood on the record conclusively admitted to be true, because no denial thereof was made by the plaintiff.

2. Failure and refusal to grant the prayer of defendant, requesting the dismissal of the amended petition, the defendant having fully answered—pleading new matter, and no reply having been filed, putting allegations thereof in issue.

3. Granting divorce and other relief incident thereto, to the plaintiff when a divorce and general relief should have been granted to the defendant on the admitted charges of gross neglect of duty and extreme cruelty in his cross-petition.

4. The special findings transcend the issues made by the pleadings and are foreign to and irrelevant to the issues presented on the pleadings.

5. Facts found, do not sustain the conclusions of law.

6. Error in not promptly granting defendant's motion for a new trial filed January 5, 1954.

7. The entry of a general judgment and decree under date of February 2, 1954, when the court was mandatorily required to return special findings in the case.

8. The facts found and the conclusions of law have no competent evidence in the record to sustain the same, because of the factual insufficiency of said amended petition.

9. The overruling of defendant-appellant's motion for a new trial.

10. Other errors, defects and irregularities too numerous to here detail, the indulgence and perpetration of which ousted the court of jurisdiction and rendered its decree of divorce and alimony void."

It is clear from the record that the court did not intend that its conclusions of fact and law should constitute the decree for divorce. The journalizing of such findings on January 4, 1954, did not constitute the judgment of the court. For that reason there was no judgment which

could be the basis for the filing of a motion for new trial on January 5, 1954. The defendant's attempt to file such a motion on January 5, 1954, was of no legal effect.

We have examined the bill of exceptions and the transcript and we find that on the record this appeal does not entitle the appellant to the relief he seeks.

First, it is claimed that no answer having been filed to the defendant's cross-petition, constitutes an admission of the allegations of fact contained therein, and if such facts be admitted the plaintiff is not entitled to a divorce as a matter of law.

There is no such thing as judgment by default in a divorce action. The failure to controvert or put in issue the allegations of a petition or cross-petition by answer or reply, in no sense constitutes admissions of truth of the allegations contained in such pleadings in a divorce action.

The statute (Sec. 3105.11 R. C.) on the right of a plaintiff to a divorce on the allegations of a petition not put in issue by answer provides:

> "A judgment for divorce or for alimony shall not be granted upon the testimony or admissions of a party unsupported by other evidence. No admission shall be received which the court of common pleas has reason to believe was obtained by fraud, connivance, coercion, or other improper means. The parties, notwithstanding their marital relations, shall be competent to testify in actions and proceedings under Sections 3105.01 to 3105.21 inclusive, of the Revised Code, to the same extent that any other witness might."

This section has application to the allegations of a cross-petition. A divorce action is one provided for by statute and is based on an appeal to the sound discretion of the trial (Common Pleas) court for the determination

of facts in support of one or more of the grounds for divorce as provided by statute, which, if established by sufficient evidence, authorizes the judge to enter a decree accordingly, and technical rules of pleading, or the failure to plead by answer or reply, cannot be considered as admissions or take the place of required proof in such an action. It should also be noted that no objection was made to proceeding on the pleadings as they were when the case was called for trial.

It is next claimed that the petition which charges gross neglect of duty and extreme cruelty without allegations of fact which, if established, would constitute proof of such charges, does not state a cause of action. This contention is not supported by the cases. While a petition so drawn is subject to a motion to make definite and certain, it is not subject to demurrer. *Kelly v. Kelly,* 74 O. App. 225.

An examination of the bill of exceptions shows that the court's conclusions of fact are well supported by credible evidence.

The claim that the court committed reversible error in failing to rule on defendant's first motion for new trial, is not well taken because the motion was filed before judgment and was therefore not one which the court need consider, and it further appearing that the court ruled on a second motion for new trial filed after judgment was entered.

For the foregoing reasons the judgment of the common pleas court is affirmed. Exceptions noted. Order see journal.

HURD, *P.J.*, KOVACHY, *J.*, concur.

DECISION OF THE SUPREME COURT OF OHIO.

THE STATE OF OHIO,
CITY OF COLUMBUS.

THE SUPREME COURT OF THE STATE OF OHIO,
Of the Term of January, A. D. 1954
To wit: Wednesday, June 30, 1954.

No. 34,033.

GEORGIA RIDGEWAY,
Plaintiff-Appellee,

vs.

ROGERS RIDGEWAY,
Defendant-Appellant.

APPEAL FROM THE COURT OF APPEALS
OF CUYAHOGA COUNTY.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, upon the motion of appellee to dismiss the appeal, filed as of right herein, and was argued by counsel. On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause. It is further ordered and adjudged that the appellee recover from the appellant her costs herein expended, taxed at $22.00. ORDERED, That a special mandate be sent the Court of Common Pleas of Cuyahoga County to carry this judgment into Execution. ORDERED, That a copy of this entry be certified to the Clerk of the Court of Appeals of Cuyahoga County, "for entry." (Seal.)

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION BY APPELLANT TO VACATE AND SET ASIDE.

(Entered October 13, 1954.)

It is ordered by the Court that this motion be, and the same hereby is, overruled.

STATUTES INVOLVED.

OHIO REVISED CODE.

2309.04 (11305). **Content of Petition.**

The first pleading shall be the petition by the plaintiff, which must contain:

(A) A statement of facts constituting a cause of action in ordinary and concise language;

(B) A demand for the relief to which the plaintiff claims to be entitled. If the recovery of money is demanded, the amount shall be stated; and if interest is claimed, the time for which interest is to be computed shall be stated.

2309.34 (11336). **Amendment.**

When the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment.

2311.01 (11376). **Trial defined.**

A trial is a judicial examination of the issues, whether of law or of fact, in an action or proceeding.

2311.02 (11377). Issues defined.

Issues arise on the pleadings where a fact or conclusion of law is maintained by one party and controverted by the other. They are of two kinds:

(A) Issues of law;

(B) Issues of fact.

2311.03 (11378). Issue of fact.

An issue of fact arises:

(A) Upon a material allegation in the petition denied by the answer;

(B) Upon a counterclaim or new matter, presented in the answer and denied by the reply;

(C) Upon material new matter in the reply, which is to be considered as controverted by the adverse party without further pleading.

2315.22 (11421-2). Findings when case tried by court.

When the questions of fact are tried by the court, its findings may be general for the plaintiff or defendant, unless, with a view of excepting to the court's decision upon questions of law involved in the trial, one of the parties requests otherwise, in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law.

3105.01 (8003-1). Grounds for divorce.

The court of common pleas may grant divorces for the following causes:

(A) Either party had a husband or wife living at the time of the marriage from which the divorce is sought;

(B) Willful absence of the adverse party for one year;

(C) Adultery;

(D) Impotency;

(E) Extreme cruelty;

(F) Fraudulent contract;

(G) Any gross neglect of duty;

(H) Habitual drunkenness;

(I) Imprisonment of the adverse party in a state or federal penal institution under sentence thereto at the time of filing the petition;

(J) Procurement of a divorce without this state, by a husband or wife, by virtue of which the party who procured it is released from the obligations of the marriage, while such obligations remain binding upon the other party.

MAR 9 195
HAROLD R. WILLEY,

In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 559.

ROGERS RIDGEWAY,

Petitioner,

vs.

GEORGIA RIDGEWAY,

Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition for Writ of Certiorari To the Supreme Court of Ohio.

KENT H. MEYERS,
N. B. C. Building,
Cleveland 14, Ohio,
Counsel for Respondent.

Of Counsel:
LOUIS P. FERNBERG, JR.,
LAWRENCE E. APPLETON,
213 Film Building,
2108 Payne Avenue,
Cleveland, Ohio.

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In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 559.

ROGERS RIDGEWAY,

Petitioner,

vs.

GEORGIA RIDGEWAY,

Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari To the Supreme Court of Ohio.

A petition for divorce and alimony was filed by the Respondent in the Court of Common Pleas of Cuyahoga County, Ohio, on the 14th day of July, 1953.

The cause was heard on the 18th day of December, 1953, and resulted in a finding and decree of divorce and alimony in favor of the Respondent on the grounds of Gross Neglect of Duty; the Respondent being awarded the Petitioner's interest in premises known as 16302 Clearview Avenue, Cleveland, Ohio, which carried a substantial mortgage lien in favor of the Quincy Savings & Loan Company.

The Respondent was also awarded the household furniture, most of which belonged to the Respondent prior to her marriage to the Petitioner, and she was also awarded a 1951 4-door Buick sedan automobile which contained a substantial encumbrance on it to the Paramount Finance Company.

The Respondent was also awarded additional alimony and attorney fees in the amount of One Thousand Dollars ($1,000.00).

The decree further declared that the Respondent was not to have any interest in a parcel of real estate bearing no encumbrance; the legal title to which was in the name of the Petitioner, and which was owned by him prior to his marriage to the Respondent.

The decree further provided that the Respondent was not to have any interest in a 1951 Hudson Hornet automobile; the certificate of title to which was in the name of the Petitioner.

The decree further provided that the Petitioner was not to have any interest in two parcels of real estate which the Respondent purchased prior to her marriage to the Petitioner; one of which was being purchased on a Land Contract.

The judgment of the Court of Common Pleas of Cuyahoga County, Ohio, was affirmed by the Court of Appeals of the Eighth Judicial District of the State of Ohio in and for the County of Cuyahoga, Ohio, upon appeal by the Petitioner.

After the affirmance by the Court of Appeals of Cuyahoga County, Ohio, the Petitioner filed an appeal as of right and a motion to certify the record of the Court of Appeals of Cuyahoga County, Ohio, in the Supreme Court of Ohio.

The Respondent filed a motion to dismiss the appeal as of right and this motion was sustained on the 30th day of June, 1954.

The Supreme Court of Ohio also overruled the motion to certify the record of the Court of Appeals of Cuyahoga County, Ohio, on the 30th day of June, 1954.

The Petitioner filed an application for a rehearing in the Supreme Court of Ohio and this application was denied on the 15th day of July, 1954.

ALLEGED REASONS FOR GRANTING THE WRIT.

The Petitioner makes claim that the Writ should be granted for the following reasons:

1. (a) Because of the Supreme Court of Ohio dismissing the Petitioner's appeal as of right; the Supreme Court of Ohio being of the opinion that no debatable constitutional question was involved.

   (b) Because the Respondent failed to plead in her petition the acts of Gross Neglect of Duty and Extreme Cruelty which were offered in evidence at the trial of this cause; she merely stating in her petition that the Petitioner was guilty of Gross Neglect of Duty and Extreme Cruelty, evidence of which will be offered at the trial of her cause.

2. Because the Supreme Court of Ohio dismissed the Petitioner's motion to certify the record of the Court of Appeals of Cuyahoga County, Ohio, as the case did not present a case of great public interest.

3. By reason of the Supreme Court of Ohio not permitting the Petitioner's appeal as of right or granting his motion to certify the record, left him defenseless against the lawless confiscation of his property and his civil rights under Section 1, Article XIV, of the Federal Constitution.

4. A divorce case under the laws of the State of Ohio is a matter of great public interest.

5. Complaint that two of the attorneys who represented the Respondent, at some other time

represented the Petitioner in other matters, and as such, obtained confidants of many important facts and that the Respondent hired these two attorneys to achieve an unfair and unconscionable advantage over the Petitioner.

The reasons complained of by the Petitioner will be discussed in the order in which they are enumerated herein.

DISMISSAL OF PETITIONER'S APPEAL AS OF RIGHT.

Section 2, Article IV, of the Constitution of Ohio provides that the Supreme Court of Ohio has appellate jurisdiction in all cases involving questions arising under the Constitution of the United States or the State of Ohio.

This section further provides that in cases of public or great general interest, the Supreme Court may, within such limitations of time as may be prescribed by law, direct any Court of Appeals to certify its record to the Supreme Court and may review and affirm, modify or reverse the judgment of the Court of Appeals.

The portion of Section 2, Article IV, pertinent to the issue herein, is as follows:

SECTION 2, ARTICLE IV:

"An appellate jurisdiction in all cases involving questions arising under the Constitution of the United States or the State of Ohio.

"In cases of public or great interest, the Supreme Court may, within such limitations of time as prescribed by law, direct any Court of Appeals to certify its record to the Supreme Court and may review and affirm, modify or reverse the judgment of the Court of Appeals."

The constitutional questions claimed by the Petitioner were as follows:

1. A failure to allege the acts of Gross Neglect of Duty and Extreme Cruelty.
2. The trial court entering its decree of February 2, 1954, after making Findings of Facts and Conclusions of Law as requested by the Petitioner.

In relation to the first question, it is only incumbent upon the part of one filing a petition for divorce in the State of Ohio to allege the grounds for divorce by naming the grounds, and if the person defending said action is not satisfied with this, he can file his motion to make the petition definite and certain. See

Kelley v. Kelley, 74 O. A. 225;
Seibel v. Seibel, 30 O. A. 198;
Suhr v. Suhr, 48 O. L. A. 12.

No motion was filed by the Petitioner to the petition; he filing an answer and cross petition, and the case was tried on these pleadings. Then, how can it be said that the Petitioner was deprived of a constitutional right?

The second claim is with reference to the decree of February 2, 1954, entered by the Court after the Findings of Facts and Conclusions of Law. The record discloses the following:

That on December 29, 1953, the Petitioner requested the trial court to make a Special Findings of Facts and Conclusions of Law. This the trial court did on January 5, 1954, and same was duly journalized on the court journal; the Findings of Facts and Conclusions of Law being as follows:

FINDINGS OF FACTS.

"(a) Defendant stayed away from his home at night, sometimes all night without any explanation or excuse to his wife.

(b) Defendant did not adequately support plaintiff, although well able so to do.

(c) Plaintiff had to expend her own money for living expenses.

(d) On numerous occasions defendant struck plaintiff with his fists without cause.

(e) On several occasions defendant twisted the arm of plaintiff in assaulting her.

(f) On one occasion defendant pointed a pistol at plaintiff with threats to kill her.

(g) Defendant does not follow any lawful work or a vocation.

(h) Defendant is engaged in the illicit trafficking in intoxicating liquors.

(i) Defendant is engaged in the illicit promotion of prostitution for money.

(j) Defendant is engaged in the unlawful conduct of gambling by operation of so-called 'numbers' games.

(k) Defendant has others working for him in the promotion of bootlegging, prostitution and gambling and provides two automobiles for the furtherance of such unlawful conduct.

(l) Defendant is associated in the 'numbers' business with Joe Allen and thus carries on a gambling business.

(m) Defendant does not have the registration stamp required by Federal laws.

(n) Defendant has served twice in the Ohio State Penitentiary following conviction for felonies.

(o) Defendant has twice been convicted of violating anti-gambling ordinances of the City of Cleveland."

CONCLUSIONS OF LAW.

"(a) Defendant is guilty of gross neglect of duty.

(b) Plaintiff granted a divorce and is awarded the Clearview Road property, the automobile now in her possession and $1,000.00 by way of attorney fees."

The record further discloses that from these Findings of Facts and Conclusions of Law, the Petitioner, on January 5, 1954, filed a motion for a new trial; that he then signed the journal entry of the Court of Common Pleas of Cuyahoga County, Ohio, dated February 2, 1954; that he then filed a Notice of Appeal from this decree of February 2, 1954, and prosecuted an appeal from this decree to the Court of Appeals of Cuyahoga County, Ohio, which Court had a full and complete Bill of Exceptions filed by the Petitioner in that Court.

The appeal to the Supreme Court of Ohio was also prosecuted by the Petitioner from the decree of February 2, 1954.

We fail to understand where any constitutional question is involved on this claim of the Petitioner.

The Supreme Court of Ohio, under the Ohio Constitution, is only obligated to admit for review in connection with its appellate jurisdiction, cases involving a debatable constitutional question or a matter of public or great general interest.

The issue raised by the Petitioner does not come within this category; his first claim relating to a method of pleading and what evidence can be received under the form of pleading at the trial in the court of original jurisdiction.

The other claim was that he was entitled to appeal his cause to the reviewing court on the Findings of Facts and Conclusions of Law found by the trial court, and in

this connection, we do not dispute that the Petitioner could appeal direct to the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio on the Findings of Facts and Conclusions of Law found by the trial court, but he did not elect to do so; he electing to appeal from the decree of February 2, 1954, the record disclosing that a motion for a new trial was filed and overruled from this decree, that a notice of appeal was filed from this decree and that a Bill of Exceptions containing all the evidence taken at the trial was prepared and filed in the Court of Appeals of Cuyahoga County, Ohio, by the Petitioner.

The only purpose under the laws of Ohio of a Findings of Facts and Conclusions of Law by the trial court is to provide an opportunity for the aggrieved party to prosecute error without resorting to the securing of a Bill of Exceptions. See

Grant v. Cleveland Trust Company, 11 O. O. 3.

How can the Petitioner claim that when all the evidence taken in the trial court was before the reviewing courts in the form of a Bill of Exceptions and when a transcript of the docket and journal entries was also there, he was deprived of a constitutional right.

FAILURE TO PLEAD THE ACTS OF GROSS NEGLECT OF DUTY AND EXTREME CRUELTY.

We have discussed this matter heretofore in this brief and will spend no further time on it.

FAILURE OF THE SUPREME COURT OF OHIO TO CERTIFY THE RECORD.

We have also discussed this subject matter heretofore in this brief and will only say that the Supreme Court of Ohio is required under the Constitution to require the Court of Appeals to certify the record when a matter of public or great general interest is involved. It found that there was no such reason and therefore, refused to certify the record.

DISMISSING THE APPEAL AS OF RIGHT.

The Supreme Court of Ohio, under the Constitution of Ohio, is only obligated to admit for review to said court, a matter involving a debatable constitutional question, and there being none in this case, rightfully sustained the motion of the Respondent to dismiss the Petitioner's appeal as of right.

DIVORCE CASE A MATTER OF GREAT PUBLIC INTEREST.

We do not dispute the fact that divorce is a matter of great public interest, but when the Supreme Court only had before it a question of pleading and appellate procedure which was definitely defined by the law of the State of Ohio, this case was not one of public or great general interest.

COMPLAINT OF RELATIONSHIP OF COUNSEL.

Counsel for the Petitioner makes claim that Louis Fernberg and his son, Louis P. Fernberg, Jr., had represented the Petitioner in various other matters prior to this litigation and as a result of said representation obtained confidential information to the disadvantage of the Petitioner.

The claim is absolutely untrue as there is not a single word in the entire record on this subject matter, which counsel representing the Petitioner definitely knows, and we are at a loss to understand how this subject matter became injected into his brief.

In conclusion, we respectfully submit that there are no constitutional questions involved in this case which would give this Court jurisdiction, and therefore, the Writ of Certiorari should be denied and the petition of the Petitioner dismissed.

Respectfully submitted,

KENT H. MEYERS,
N. B. C. Building,
Cleveland 14, Ohio,
Counsel for Respondent.

Of Counsel:

LOUIS P. FERNBERG, JR.,
LAWRENCE E. APPLETON,
213 Film Building,
2108 Payne Avenue,
Cleveland, Ohio.

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HAROLD B. WILLEY, C

In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 559.

ROGERS RIDGEWAY,
Petitioner,

vs.

GEORGIA RIDGEWAY,
Respondent.

PETITION FOR RE-HEARING ON ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

ALEXANDER H. MARTIN,
Prospect-Fourth Building,
Cleveland, Ohio,
Counsel for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5847

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In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 559.

ROGERS RIDGEWAY,

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vs.

GEORGIA RIDGEWAY,

Respondent.

PETITION FOR RE-HEARING ON ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Comes now the above named petitioner, by Alexander H. Martin, Esquire, his Attorney, and shows the court that:

1. On page 3 (top), respondent, in her Brief in Opposition to his Petition for Writ of Certiorari, makes the *false and misleading statement* that petitioner had filed an Application for a Re-hearing in the Supreme Court of Ohio, and that same was denied on July 15, 1954.

Said statement and the admissions to and including paragraph 4 hereof are Circumstances Intervening since the filing of the said Petition—squarely contrary to the record as shown by the transcript—tending to, and made for the purpose of misleading the court, to petitioner's prejudice. That is, to have it believed that petitioner failed to apply for a re-hearing within the fourteen day limitation imposed by the Rules of said court for such application.

The essential fact being, however, that no Application for Re-hearing was filed, but a Motion to Vacate the order complained of, for irregularity in obtaining the same, was made,—"invoking the exercise of the

inherent power possessed by all courts of setting aside judgments and decrees obtained by fraud, mistake or irregularity,—regardless of and independent of Statutes or Rules of Court." *Longworth v. Sturges,* 2 O. S. 107; *Brown v. Aspden,* 14 Howard 25, the said limitation for filing which is two years.

"Same is not a separate and independent proceeding but a special proceeding in the action to effect a judgment rendered therein." *Beck v. Beck,* 48 Oh. App. 105.

2. On page 5 of respondent's said Brief, admission is made,—

(a) That petitioner duly requested and was entitled to Special Findings of Fact and Conclusions of Law,—under the statute;

(b) That certain designated Findings of Fact and Conclusions of Law were made on January 4, 1954, in said case and journalized in Journal 332, page 9 of the Divorce Journal;

(c) And likewise that the sufficiency of said Special Findings was challenged by petitioner's Motion for New Trial duly filed, and

(d) That a *General Judgment* for Divorce, Alimony and Attorneys' Fees was made on February 2, 1954, *allegedly displacing, and for the purpose of displacing, the judgment and decree of January 4, 1954,* —from which decree appellate proceedings were taken.

3. Said Brief in opposition, further—

(a) Admits that said Motion for New Trial and said Objections to the Sufficiency of said Special Findings, filed January 5, 1954, still repose in the record in said case, unacted upon and undisposed of;

(b) Admits that the actual making and adoption by the court of a general decree of divorce and alimony on February 2, 1954, is contrary to the mandatory operation of 2315.22 R. C. requiring the trial

court to adjudge the issues of fact in the case by and through the instrumentality and operation of the Special Findings,—or not at all;

(c) Admits that the Petition alleges no Traversable Facts,—and tendered no issue of fact to be tried; and contends that the marriage contract may be dissolved in Ohio, with no such issues being made;

(d) Admits that no issue of fact was actually tried, according to regular code procedure in the case, because no such issue was formulated in the pleadings, and asserts that *such formal procedure was legally dispensed with;*

(e) Said Brief admits that all court action in the case, by respondent, subsequent to February 2, 1954, was directed toward the attempted vindication of the validity of said decree of February 2, 1954, and avoiding said decree of Special Findings of January 4, 1954, —as a nullity, and as of no force and effect whatever, —*affirmed by the Court of Appeals and the Supreme Court;*

(f) And admits that said Special Findings of Fact were not based on, nor responsive to any issue of fact defined in the pleadings,—but are wholly foreign to any such issues, and supportable only by reference to a Bill of Exceptions to establish facts not found in the Findings of Fact, but an irregular, illegal effort to avoid the fatal effect, procedurally, of the failure to define any Issue of Fact for Trial, on the pleadings.

4. All of which admits, and indulges,—to enable said Ohio Courts to despoil petitioner of his sacred Civil Rights and to confiscate his property,—that construction of Sec. 2315.22 O. R. C.,—in permitting a General Judgment, where Special Findings only were authorized,—which offends against the guaranty of Due Process of Law and the Equal Protection of the Law under Article XIV, Section 1, of the Federal Constitution, under a properly filed request for Special Findings,—and the operation of the statute of Sec.

3105.01 O. R. C., defining Ohio grounds for divorce. Which likewise contravenes Article IV, Section 4, of the State Constitution. The Federal question, with reference to which was raised on January 4, 1954, by petitioner's Motion for New Trial and Objections to the Sufficiency of Special Findings, then, and still reposing in the record, unacted upon and undisposed of.

5. Petitioner further shows that all the foregoing matters in respondent's opposing Brief, conclusively admit Jurisdiction as claimed in petitioner's Petition for Writ of Certiorari II,—a, b, and c, on pages 3 and 4 thereof,—to which petitioner hereby refers, and by reference, makes all the allegations of the same a part of this his Petition for Re-hearing,—as fully as if here rewritten.

6. The facts set forth hereinabove, from paragraphs numbers 1 to 5 inclusive, are circumstances of controlling effect and of substantial importance, intervening since the filing of said Petition, intended to and influencing the court to his prejudice.

Section 2315.22 R. C. expressly states that when Special Findings are duly requested,—

> "The court shall state in writing the Conclusions of Fact found separately from the Conclusions of Law, and that the court may not make a general finding or judgment for the plaintiff or defendant when, with a view to excepting to the court's decision upon Questions of Law, one of the parties requests Special Findings."

It is admitted in respondent's Brief in opposition to the Petition for Writ of Certiorari that Special Findings were duly requested and made, and then abandoned by the court, in all the court's proceedings from that point on.

Section 2321.20 O. R. C. of the code regulating the manner of the exercising of its jurisdiction by the Common Pleas Court, confers the right upon petitioner to file his

Motion for New Trial and his Objections to the Findings of Fact made on January 4, 1954,—as he did on January 5, 1954.

It then and there became the bounden duty of said trial court to pass upon and dispose of that Motion for New Trial and those Objections to Special Findings as the first step in appellate proceedings, even if the operation of 2315.22 R. C., and our duly made request for Special Findings, under settled Ohio practice, did not preclude the possibility of entering a valid General Judgment against the petitioner.

It follows that the judgment of February 2, 1954, and all proceedings subsequent thereto, in this case, are *void and invalid as in excess of the jurisdiction of the court,* in the premises.

EFFECT OF GROSS IRREGULARITY.

But the radical departure of the trial court from the accepted and necessary regular procedure in entering a General Judgment in spite of the provision of 2315.22 R. C., to the contrary, and the failure to act on the Motion for New Trial,—ousted the court of jurisdiction to proceed further in the case, so that all proceedings thenceforward are void because in excess of any jurisdiction conferred on the Common Pleas Court by the statute under which it was proceeding. And the ruling of the Court of Appeals, here complained of, in refusing to pass on said Motion challenging the sufficiency of the Special Findings and the final decree of the court, was an abuse of discretion not cured by the affirmance thereof by the Supreme Court, by the dismissal of our Appeal as of Right, nor by the refusal of our Motion to Certify,—but left the same, in its operation, clearly obnoxious to the guaranty of Due Process of Law, and Equal Protection of the Law, under the Federal

Constitution, Article XIV, Section 1, and subversive of the constitutional right to have justice administered by due course of law under the State Constitution, Article I, Section 16.

For said court, and this Court, ought to proceed and must proceed in consonance with these following authorities, in this case.

The courts must function in obedience to the procedural enactments of the legislature,—not against them.

> "The legislature, while it may not enlarge or limit the jurisdiction of the Court of Appeals, can determine and prescribe the method of exercising that jurisdiction."
>
> *Bauer v. Grinstead,* 142 O. S. 56; 50 N. E. (2d) 334.

> "And the method of exercising its jurisdiction for the Common Pleas Court is fixed by legislative enactment."
>
> *Mattone v. Argentina,* 123 O. S. 393; 175 N. E. 603.

So that when it is enacted that a motion for new trial may be filed as the first step in appellate proceedings challenging the sufficiency of the Special Findings, it is manifestly arbitrary, and an abuse of discretion, and a fine example of lawless law enforcement for the trial court in this case to fail and refuse to pass upon that motion, and for the Court of Appeals to affirm that action as it has done. The court,—we would observe, with all respect, ought to grant this petitioner the benefit of a review of the erroneous action of the lower courts, here complained of, and relieve him from the subversive effects of this confiscatory judgment.

For *Windsor vs. McVeigh,* 93 U. S. 274, says:

> "All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular

classes of action, such as legal or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of judgment. Though the court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in its mode of procedure and in the extent and character of its judgment. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and the parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the case be for the possession of real property, the court is powerless to admit in the case the probate of a will.

"The judgments mentioned in the given cases supposed, would not be *merely erroneous; but would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases.*

" 'So,' says the court, 'a departure from an established mode of procedure will often render the judgment void; thus the sentence of a person charged with a felony without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral allegations without written pleadings would be an idle act,—* * * and the reason is, *that courts are not authorized to exert their powers in that way.*' "

The judgment of a court is only safe from collateral attack because of invalidity:

"When the court proceeds, after acquiring jurisdiction of the cause, according to the established modes gov-

erning the class to which the case belongs, and does not transcend in the extent or character of its judgment, the law which is applicable to it." *Windsor v. McVeigh*, 93 U. S. 274.

"Where it is clear that action of state violates terms of the Federal Constitution,—it is the obligation of the United States Supreme Court to so declare."

Shelley v. Kraemer, 68 U. S. Supreme Court Rpr. 836, Syl. 19.

"State action within the 14th Amendment refers to exertions of state power in all forms and when the effect of that action is to deny rights subject to the protection of the 14th Amendment,—it is the obligation of the United States Supreme Court to enforce the constitutional commands." (Idem, Syl. 11.)

"The action of state courts in imposing penalties or depriving parties of other substantial rights without providing adequate notice and opportunity to defend is a denial of due process of law guaranteed by the 14th Amendment." (Idem, Syl. 7.)

all of which will prevent the making of the decree complained of, unless and until a petition is filed stating the cause of action, and until an Issue of Fact is formulated on the pleadings, to be tried by the court.

Respondent admits that there is no proper petition in the case to state factually a cause of action for divorce, but says we should have made a motion for a better petition. In so contending, and the court in so deciding simply put the *emphasis* on the wrong syllable. For it is inescapable that the inertia of the court must first be overcome by the filing of a petition which states a cause of action conformable to the legislative requirements. It is not good law nor good logic for any court to say that the legislative enactments can in practice be set aside by *some modern rule* which allows the plaintiff in a divorce case, which has to

do with the most important contract known to our law, to come into court except through the Constitutional Portal and be sent forth and go out without first acknowledging the enforcement of proper judicial procedure.

CONCLUSION.

WHEREFORE, and for the reasons set forth above and in the Petition for Writ of Certiorari, it is respectfully urged that a re-hearing be granted in this case and that, upon the re-hearing, the Writ of Certiorari issue to the Supreme Court of Ohio as prayed.

Respectfully submitted,

ALEXANDER H. MARTIN,
Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

ALEXANDER H. MARTIN,
Counsel for Petitioner.